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THE POWER OF THE STATES TO TAX INTANGIBLES

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There have been but few judges who have shared Mr. Justice Holmes' doubts[1] as to the relevance of the due process clause of the fourteenth amendment to the problem of the states' jurisdiction to tax. The doctrine that it imposes important limitations on the states in that matter is now too firmly established to encourage any hope of its abandonment within any reasonable future period. States will have to continue adapting their tax policies to its requirements however much publicists may inveigh against it as an instance of judicial usurpation. There has already developed a considerable body of law defining the specific meaning of the due process clause in relation to this problem as applied to a variety of particular fact situations. Recent decisions of the Supreme Court of the United States have, however, raised the question of how far the earlier decisions may still be accepted by the states as safe guides by which to steer their tax courses in dealing with intangible property whether as tax subject or as tax measure.[2] The difficulty confronting the states has arisen from the frank repudiation by some of those decisions of principles that had for years passed current as law. The lack of agreement among the members of the Court as to the reasons for the reversal of former specific rules adds to the uncertainty of what, if any, further changes may be expected. Every attempt to plot the course of future decisions involves predictions whose probable accuracy will depend on the extent to which they are based on the selection and proper weighing of the factors that will affect those decisions. No rule or system of rules has yet been discovered for eliminating uncertainty from our predictions. There are factors which we have reason to believe will affect the result but of whose influence and method of operation we know so little that our knowledge constitutes an insecure and unsatisfactory basis for prediction.

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[1] Union Ref. Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

[2] See for discussion of the problem of tax subject and tax measure, Isaacs, *The Subject and Measure of Taxation* (1926) 26 COL. L. REV. 939.

There are others whose operations have been more clearly revealed. Our knowledge of the extent and method of their contribution to the result is neither complete nor exact, but merely more adequate than with respect to other factors. It seems preferable, in the present state of our knowledge, to base our predictions on this latter type. The most important of these is the effect upon judicial decisions of prior judicial decisions and theories. However deficient our knowledge of its influence may be, we still know more about that than about the effects of judicial social philosophies, and infinitely more than about the effects of the judges' physical condition when passing on the case, about which our knowledge is so meager that outside aid has to be invoked to give plausibility to the theory of its contribution. This does not involve any denial that other factors than past judicial acting and thinking have a bearing on the problem. It means only that past judicial decisions, and the reasoning and theories explicit or implicit in judicial opinions, are the materials having the greatest presently available predictive value even in dealing with a problem created by decisions involving judicial refusal to treat those factors as the sole or necessarily most decisive determinants in the process.

The scope of the changes wrought in the law as to a state's power to subject intangibles to various kinds of taxes by the series of recent decisions[3] depends on their implications which in turn are closely tied up with their reasoning. They all involved inheritance taxes imposed by states other than that of the decedent's domicile. The sole basis for the tax in the *Farmers Loan & Trust Co. and Beidler Cases* was the domicile of the debtor within the taxing state, while in the *Baldwin Case* the claim was predicated, as to some of the credits, on the presence for safe-keeping within the state of the securities representing the credits.[4] The *Farmers Loan & Trust Co. Case* was the first to definitely and explicitly break with the law as theretofore established in *Blackstone v. Miller*[5] which had sustained an inheritance tax by the state of the debtor's domicile on credits of a non-

[3] Farmers Loan & Trust Co. v. Minn., 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930); Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930); Beidler v. South Carolina Tax Comm., 282 U. S. 1, 51 Sup. Ct. 54 (1930).

These decisions will frequently be referred to in the subsequent discussion as "the recent decisions" or "the recent cases."

[4] This statement is not intended to affirm that the arguments used in the opinions in some of these cases do not suggest other possible bases. These will be considered in the course of the discussion.

[5] 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903).

resident with respect to whose transfer the decedent's state had imposed a like tax. Power over the debtor was held to confer jurisdiction to tax, and the resulting multi-state taxation was held not to violate either the fourteenth amendment or any other federal constitutional provision. A little more than a decade after *Blackstone v. Miller* due process was construed to permit a state to levy an inheritance tax on the transfer of notes owned by a non-resident but kept within the state for safe-keeping, even when the debtors were non-residents of the taxing state and no property within it was mortgaged to secure the notes.[6] The principal reason urged in support of this conclusion was that the convenience and understanding of business men, which had made of bonds the debt itself, extended to bills and notes, and that, therefore, the credits could be deemed to have a situs where their tangible evidences were kept. There was no doubt but that the state in which credits had a business situs could impose an inheritance tax on their transfer on that basis alone even as that factor justified it to tax them by property taxes.[7] There were, therefore, four distinct jurisdictions that had a constitutional power to subject the transfer of credits and bonds to inheritance taxes at the time the Court decided the *Farmers Loan & Trust Co. Case.* Efforts to reduce this evil by deducing from the due process clause a prohibition against inheritance taxation by the state of decedent's domicile when the bonds were permanently kept for safe-keeping outside it, based on the theory that such bonds were tangibles within the protection of the principle of *Frick v. Pennsylvania*,[8] were defeated not long before the *Farmers Loan & Trust Co.* decision.[9] It was this "startling possibility" which suggested to the Supreme Court that the law on this matter had developed from an incorrect premise. It is this new premise that must be sought in the recent decisions.

The reasoning of the prevailing opinion of Mr. Justice Mc-

[6] Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030 (1914).

[7] New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899).

[8] 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316 (1925).

[9] Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410, 72 L. ed. 749 (1928). It was the holding in this case that bonds were intangibles that caused the Supreme Court of Minnesota, which had first held the bonds in the Farmers Loan & Trust Co. case not taxable because they were tangible [*In re* Taylor's Estate, 175 Minn. 310, 219 N. W. 153 (1928)] to reverse its former holding [*In re* Taylor's Estate, 175 Minn. 315, 221 N. W. 64 (1928)] only to have their former result affirmed by the federal Supreme Court, although on a different theory.

Reynolds in *Farmers Loan & Trust Co. v. Minnesota* formulates a new premise for at least a certain class of cases. It commences with an unusually explicit over-ruling of *Blackstone v. Miller* so far as that decision lent support to the theory that different states could tax on diverse and inconsistent theories. The case was overruled because it had produced friction between the states and its practical effects had been bad. This, however, does not yet give a new premise. That is found in that part of this opinion in which it holds that the general reasons inhibiting the taxation of tangible personalty by more than one state apply "under present circumstances equally to intangibles." The reasons assigned are that primitive conditions have passed, that business is now conducted on a national scale, and that a large part of the national wealth is invested in negotiable securities whose protection against discriminatory, unjust and oppressive taxation is a matter of the greatest moment. This is in accord with its previous statement that the doctrine of *Blackstone v. Miller* is no longer tenable because of the ill effects of that decision. In the end the opinion concludes that it finds no sufficient reason for the position that intangibles are not entitled to immunity from taxation at more than one place the same as tangibles. The broadest premise deducible from this opinion is that due process prohibits multi-state taxation of intangibles to the same extent that it prevents multi-state taxation of tangible personalty. The narrowest premise derivable from it is that due process prevents the state of the debtor's domicile from subjecting the transfer of bonds to an inheritance tax merely on that basis. That the premise intended was broader than that last suggested is clear from the subsequent decisions which have extended immunity from inheritance taxation predicated on the sole basis of power over the debtor to bank accounts and ordinary notes, whether or not secured by property within the taxing state,[10] and to ordinary open accounts.[11] It should be noted that even power of the taxing state over the notes did not confer power to impose the tax. How much broader the premise may be cannot yet be authoritatively determined, but, if its scope is to be defined by reference to the practical considerations relied on in this opinion, there is no reason for treating it as anything but a prohibition on all multi-state taxation of every type of intangible. There is no indication that the discriminatory, unjust and oppressive burden consisted in anything other

[10] Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930).
[11] Beidler v. South Carolina Tax Comm., 282 U. S. 1, 51 Sup. Ct. 54 (1930).

than the fact of multi-state taxation of the same transfer under modern conditions as to the distribution of capital and its ownership, which take no account whatever of state lines. That burden is certainly no less in connection with other kinds of intangibles, nor in respect of other types of taxes than inheritance taxes. If the premise that was probably in the minds of those of the justices who accepted this opinion becomes that of the Court, further sweeping changes in existing law as to a state's jurisdiction to tax are inevitable.

The problem, however, can not be answered merely on the basis of the premise implicit in the opinion last considered even though the last of the decisions in this series (which involved the power of the debtor's state to place an inheritance tax on the transfer of an open account)[12] was made without the dissents that marked the two others. The theories advanced in the concurring opinion of Mr. Justice Stone in the *Farmers Loan & Trust Co. Case* and in his dissent in *Baldwin v. Missouri,* and in the dissents of Mr. Justice Holmes in both these cases, must also be considered. It will be convenient to consider first the dissenting opinions of the latter, concurred in by Mr. Justice Brandeis. The emphasis in his dissent in the *Farmers Loan & Trust Co. Case* was on the fact that the laws of Minnesota were necessary to the continued existence of the obligation so that its help was necessary to acquire a right, and that it could demand a quid pro quo therefor. The affirmative argument in his dissent in *Baldwin v. Missouri* was predicated on the protection the assets in question received from Missouri, although it also contained a plea not to hedge the taxing powers of the states with restrictions deduced from the due process clause, and repeated the theory that that clause does not permit the Court to interpose to prevent multi-state taxation. These last considerations would have more force if the doubts as to the relevance of the due process clause, originally expressed by Mr. Justice Holmes in the *Union Ref. Transit Co. Case,*[13] had not been resolved against his view by a long series of subsequent decisions. Once that had happened, the issue was no longer as to its relevance, but became that of the extent of the limitations imposed on the states by its vague provisions. At this point the plea for a recognition of the states' interest in a considerable freedom of action in shaping their tax policies directs attention to a factor that deserves a consideration that it failed to receive in the prevailing opinions. The posi-

[12] Beidler v. South Carolina Tax Comm., 282 U. S. 1, 51 Sup. Ct. 54 (1930).
[13] 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (1905).

tion, however, that Minnesota should have been allowed to tax because the obligation owed its origin and continued existence to its laws seems adequately answered by the theory of Mr. Justice Stone that, once it had passed out of that state, the laws of Minnesota neither protected it nor could it withhold the power of transfer or prescribe its terms, and his further position that the fact that Minnesota law kept the obligation alive constituted too attenuated a legal relation of that state to the obligation to furnish a reasonable basis for its taxation of the transfer.[14] The reference by Mr. Justice Holmes of Missouri's power to tax to the protection it accorded the securities involved in *Baldwin v. Missouri* has considerable support in the authorities. The prevailing opinion in the case last cited ignored this factor, but there is no way for determining whether this is to be taken as an indication that that factor has become unimportant or means merely that it cannot prevail when another state has a prior claim to tax.

There remain to be considered the views of Mr. Justice Stone. He agreed with the results reached in *Farmers Loan & Trust Co. v. Minnesota,* but reached it by a quite independent line of reasoning. Starting from the premise that a state can impose a privilege tax, such as an inheritance tax, only if the privilege is enjoyed within it, he held the tax invalid because the transfer of the bonds was effected in, and controlled by the laws of, the state of the decedent's domicile, strengthening this position by invoking the principle that it is that law which, by generally accepted rules, is applied in the transfer and receives recognition elsewhere. If, however, the facts are such that an act essential to a completed transfer must occur in another state, which ordinarily could be compelled only within it and in accordance with its laws, then such non-domiciliary state can impose its inheritance tax on that transfer. It was for this reason, and also because a transfer by delivery made in Missouri would have defeated the transfer made in the state of decedent's domicile, that he dissented in *Baldwin v. Missouri.* The fact on which Missouri's powers must have been deemed predicated was the presence of the bank account, bonds and notes within it, and their ancillary administration therein, since this factor alone applied to each of the assets involved in the case. The earlier decision in *Wheeler v. Sohmer* is a logical implication of this theory. It is very doubtful that Mr. Justice Stone was

[14] See opinion of Mr. Justice Stone in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930).

merely expanding the power argument in the form that it took in *Blackstone v. Miller,* since he must be deemed to have rejected that in reaching the result he reached in *Farmers Loan & Trust Co. v. Minnesota.* His view rather seems to be that the payment of a tax in two places on the same economic interest, with respect to which the owner has sought and secured the benefit of the laws in both, is not so oppressive or arbitrary as to violate constitutional limitations. The substance of this position is that a state has the power to tax an economic interest to which it has accorded protection if its owner has sought its protection with respect thereto. This correlation of the power to tax with benefits conferred has considerable authority to support it, but there have been decisions denying it even as to an economic interest voluntarily within the taxing state.[15] Whether the mere receipt of benefits would justify a tax is not quite clear in view of the reference to the factor that the owner had sought the benefits derived from the laws of the taxing state.[16] It may, in any case, be assumed that the situation in the *Baldwin Case* constituted one within the theory expressed by Mr. Justice Stone in his concurring opinion in *Farmers Loan & Trust Co. v. Minnesota* that a single economic interest might have such legal relationships with different taxing jurisdictions as to justify its taxation in both. There is no indication that he intends to raise any question as to the domiciliary state's power. It rather seems that in his view that state has the power to impose the tax in the case of all intangible personalty. His theory at this point is probably not intended to suggest a principle for restricting the domiciliary state's power, but rather to announce a basis for defining what other states shall also be permitted to tax. This seems the view most consistent with his clear disapproval of the theory that multi-state taxation alone and under all circumstances amounts to a violation of the due process clause expressed in his opinions.

The preceding analysis of the *Baldwin* and *Farmers Loan & Trust Co. Cases* has shown several members of the Court averse to

[15] See, *e.g.,* Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106 (1907).

[16] The securities of a resident of one state might be in another state in the possession of a thief resident in the latter on the day of the true owner's death. The latter state would restore the securities to the proper representatives of the decedent if proper steps were taken. Does the reference to the factor that the owner sought the protection result in preventing the non-domiciliary state from imposing its inheritance tax under these circumstances? And would resort to its courts to recover them involve seeking its protection so as to permit the tax to be imposed?

treating the due process clause as a complete prohibition of multi-state taxation of the same legal and economic interest. The single element common to the views of the several dissenting justices is the conception that a state that accords to an interest benefits and protection should be permitted to tax it irrespective of the recognized power of another state to also tax it. The question, therefore, arises whether the rather lukewarm assent of Messrs. Justices Holmes and Brandeis to the extension of the principles of these cases by the case of *Beidler v. South Carolina Tax Commission* is to be taken as a complete acceptance by them of the theory that multi-state taxation violates due process or merely as a recognition that the prior decisions, even when not thus broadly construed, could not well be denied application to the credits involved in that case. Further decisions involving inheritance taxes on other intangibles, or other types of taxes on the same or other intangibles, alone can give the answer; but it seems reasonably clear from the tenor of their concurring opinion that further opposition may be expected to extending the theory, which the majority of the court seems to have accepted, to other intangibles and to other types of taxation. Nor is there any present indication that Mr. Justice Stone has surrendered the position so forcibly and ably presented by him, unless his failure to express himself in the *Beidler Case* can be construed so to indicate, which is highly doubtful. The net effect is a condition of uncertainty as to the exact premise that will furnish the approach to future problems. Even, however, if the complete prohibition of multi-state taxation be taken as the premise most likely to be adopted, there remains the question of when that will be deemed to be present. There are many situations in which the same single economic interest is treated as supporting a series of legally recognized interests therein. The ultimate economic interest supporting the mortgagor's and mortgagee's legal interest in mortgaged realty is identical to the extent of the amount of the loan secured by the mortgage. Yet it is practically certain that the state in which the realty is situated would not be violating due process by taxing the mortgagor on the whole value of the mortgaged premises while contemporaneously taxing the credit secured by that mortgage.[17] Due process, therefore, does not require a state to recognize that these different legal interests merely represent a division of shares in a single economic interest, but permits

[17] This is not decided in, but seems to be a fair inference from, Paddell v. New York, 211 U. S. 446, 29 Sup. Ct. 139, 53 L. ed. 275 (1908).

the double counting of values supported by a single economic interest in the determination of the total taxable wealth within its jurisdiction.[18] This duplication of taxable wealth through the recognition of different legal interests in the same ultimate economic value occurs in an even more exaggerated form whenever the trustee and the cestui are treated as having separate taxable interests in the same assets. Due process does not prohibit a state from taxing that one of those interests within it even when the other is beyond its power and taxable elsewhere.[19] Here the duplication frequently involves doubling the actual economic wealth for tax purposes, a result not affected by the fact that the different interests are being taxed by different states. The case of taxing both the corporate assets and the stockholders' shares evidencing a distributive economic interest therein, whether by the same or different states, furnishes another instance of the same kind against which the federal Constitution interposes no barrier. There is nothing in the theory applied in the recent decisions heretofore discussed that requires, or even suggests, the conclusion that these forms of multiple taxation of the same ultimate economic interest will be held violative of due process. Those decisions involved the relation of one owner to a given complex of economic relations constituting a single economic interest. That owner may stand in more than one legal relation with respect to that interest under the laws of different states, but these decisions limit to one state the power to recognize such relation for tax purposes. The thing aimed at is the taxation by more than one state of a single economic interest of a given person. The system of concurrently existing legal or equitable interests in a single ultimate economic interest may still be recognized by states for tax purposes despite the resulting multiple taxation of that interest. The thing prohibited is the localizing of the legal interest representing any given person's distributive share in such a single economic interest in more than one state. That is the effect of those decisions even when the prevailing opinions are given their broadest reasonable and probable interpretation.

The acceptance of the premise that due process prohibits such

[18] There is a limit to this process derived from the due process clause. It has been held that a state in which their owner held warehouse receipts covering goods outside the state could not tax the receipts at the value of the goods covered by them. Sellinger v. Kentucky, 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761 (1909).

[19] See Welch v. Boston, 231 Mass. 155, 109 N. E. 174 (1915); Hunt v. Perry, 165 Mass. 287, 43 N. E. 103 (1896).

multi-state taxation cannot by itself settle the issue as to which state shall be permitted to impose the tax. That matter has thus far received but little attention. The decisions in all the cases under consideration have preferred the claims of the state of the decedent's domicile. The preference rests on the basis that prior decisions had determined that "in general intangibles may be properly taxed at the domicile of their owner,"[20] and that it was there that the credits passed under decedents' wills.[21] It might be said with respect to the former of these reasons that there were also prior decisions of the Court that permitted the transfer of credits to be taxed elsewhere than at their owner's domicile, one of which it expressly overruled. There was clearly nothing in the prior decisions sustaining the domiciliary state's power to tax intangibles suggesting that the recognition of its power was intended as a denial of a like power to all other states. The second of these reasons states a legal conclusion which does not at all involve the further conclusion that the credits did not simultaneously pass elsewhere unless it be assumed either that there exists some general principle of law restricting the passing of property at death to a single legal transfer or that some constitutional provision imposes such limitation. There is, of course, but one economic interest that passes from the former owner to whosoever succeeds to it, but the issue here is not one of mere fact but of what legal construction the law has imposed on such fact. There is no greater inherent legal objection to having two legal transfers imposed on one factual transfer than there is to multiplying taxable legal interests by imposing more than one legal interest on the same ultimate economic interest. It is clear, therefore, that this second reason is valid only if the conclusion it is intended to support is assumed as correct. But, whatever be the dialectic weaknesses in the reasoning supporting the preference for the domiciliary state, states will be well advised to shape their tax policies in the light of its existence. The Court has thus far avoided committing itself on the status of credits having a business situs in a non-domiciliary state. This matter will be hereinafter more fully considered.

The decisions thus far have merely determined that a state cannot impose an inheritance tax on the succession to bonds, registered[22] or

[20] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371 (1930).

[21] Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930).

[22] For state cases involving inheritance taxes on registered state bonds of the taxing state when owned by non-resident decedents, see Bliss v. Bliss, 221

otherwise, notes, bank deposits, and credits evidenced by open accounts, merely on the basis that the debtor is domiciled within it; that it cannot impose such tax merely because the bonds or notes "happen to be found" within it when their owner dies; and that it cannot impose such tax even when the notes thus found within it are secured by mortgages on local realty. The rule of *Blackstone v. Miller* was expressly overruled. Whether *Wheeler v. Sohmer,*[23] can still be considered good law depends upon several things. Even if it be assumed that but one state is to be permitted to tax the transfer of notes and bonds, still it is not absolutely certain that the domiciliary state will be the one accorded that power under the circumstances involved in that case. It is clear that that state will be selected unless another state has an exceedingly strong claim for a preferred position. The Court treated the notes and bonds in the *Baldwin Case* as happening to be found in Missouri when their Illinois owner died. It is fairly arguable that that phrase does not cover the situation in which their owner has placed notes and bonds in another state for permanent safe-keeping where they remain for that purpose until the date of his death. There would seem to be nothing oppressive or arbitrary in permitting that state, in which in many cases ancillary administration will be had with respect to those assets, to impose the tax. The Court has on more than one occasion stated that fictions will not be allowed to obscure the facts. If that be taken as the point of departure, the claim of the state in which the securities were kept would seem to be superior to that of the domiciliary state whose claim rests on the fiction of *mobilia personam sequuntur,* unless it be held that the latter state derives a superior claim from the fact that in most cases it carries the heavier burden connected with the administration of the estate. There is the further consideration that to permit the non-domiciliary state alone to tax in this situation might encourage evasion of taxes in the domiciliary state through a judicious distribution of securities for safekeeping in neighboring states. Whether this situation is within the faintly suggested reservation of Mr. Justice McReynolds in the *Baldwin Case* cannot be definitely determined.[24]

Mass. 201, 109 N. E. 148 (1915) (holding transfer taxable); Tax Comm. v. Farmers Loan & Trust Co., 119 Oh. St. 410, 164 N. E. 423 (1929) (holding transfer non-taxable). Both cases considered the problem from point of view of statutory construction only, but some of the reasoning in the Massachusetts case indicates that the court would have sustained the tax against due process objections.

[23] 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030 (1914).

[24] The language referred to is the following:

Approached from the point of view adopted by Mr. Justice Stone, this situation affords a very good instance of a single economic interest bearing such legal relationships to two states as to permit its transfer to be taxed in both, but it is unlikely that this view will prevail against the strong trend adverse to multi-state taxation. The probability, however, is rather great that the doctrine of *Wheeler v. Sohmer* can be deemed discarded, but another decision alone can remove a lingering doubt. The reason for this view is that it seems highly unlikely in fact that the securities involved in the *Baldwin Case* merely chanced to be in Missouri when their owner died; it seems more reasonable (business situs for them having been excluded by the Court's view of the case) to assume that their owner had entrusted them to his Missouri agent for safekeeping.

The present status of inheritance taxes on credits having a business situs in a non-domiciliary state is quite uncertain. The Court explicitly stated in *Farmers Loan & Trust Co. v. Minnesota* that the record presented no occasion for considering whether securities taxable by a state under the business situs doctrine could be taxed a second time at their owner's domicile. It has not yet resolved this issue since it found that the credits involved in both the *Baldwin* and *Beidler Cases* did not have a business situs in the taxing state, although Mr. Justice Stone expressed the opinion that the credits in the *Baldwin Case* might well have been found to have had a business situs in Missouri. The language employed by the Court in entering its caveat as to credits having a business situs rather suggests that the state in which they have such situs will be preferred to the domiciliary state if it is eventually decided to prohibit their multi-state taxation. This would seem to be a valid recognition of that state's superior economic claim to treat those credits as a part of the assets employed in a local business by their owner. There is but little likelihood that this will promote extensive tax evasions. The question arises whether the same considerations would not be equally applicable to a partner's interest in a partnership's business and assets, so that a deceased partner's interest therein should be localized where the buiness is conducted and the assets are employed. That is the economic fact, however much the legal issues may be complicated by

"Normally, as in the present instance, the state of the domicile enforces its own tax and we need not now consider the possibility of establishing a situs in another state by one who should undertake to arrange for succession there and thus defeat the collection of the death duties prescribed at his domicile."

questions as to the legal nature of a partner's interest in its business and assets. It has, however, been held that where, under the partnership agreement and under the laws of the state in which the partnership's assets and business were located, the partner's interest is a right to receive his share of the partnership's net value,[25] the partner's share is an intangible having a situs for tax purposes at his domicile. Hence that state has a constitutional power to tax the transfer of a resident's interest in a foreign partnership.[26] It will be rather difficult to consider oppressive and arbitrary an inheritance tax imposed on a non-resident decedent's share in a partnership imposed by the state in which the partnership business and assets are located. Injustice can be avoided in the case of a partnership with assets and business in more than one state by permitting each to tax on that portion of the value of the interest attributable to the assets and business within it. There are cases in which a state has been allowed to tax the transfer of a non-resident partner's share in the partnership capital.[27] This state's power to impose the tax should not be made to turn on legal refinements as to nature of a partner's interest in the partnership assets or business, which conceptions have been developed in connection with quite different problems. The natural desire to employ a single conception in dealing with diverse problems in order to secure a greater consistency in the whole body of the law affords but a slender basis for denying effect to the obvious economic fact that the partner's interest is as closely associated with the states in which the partnership carries on its business as are credits having a business situs with the state in which they have such a situs. If the Court translates its intimation that the state of the business situs of credits will be preferred to that of decedent's domicile into actual decision, it will be hard for it to deny that the state in which a partnership has its business and assets should also be allowed to tax the transfer of the share of a non-resident partner. This may involve considerable difficulties and great inconvenience in the case of part-

[25] This theory is in accord with that adopted by the Uniform Partnership Act.

[26] Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410, 72 L. ed. 749 (1928). See also Arbuckle's Estate, 252 Pa. St. 161, 97 Atl. 186 (1916) in which the state in which the partnership business and assets were located was held not to have taxed the transfer of a non-resident partner's interest; the constitutional issue is not considered.

[27] See *In re* Henry, 203 App. Div. 456, 197 N. Y. S. 63 (1922), modified on another point, 237 N. Y. 204, 142 N. E. 586 (1923); Small's Estate, 151 Pa. St. 1, 25 Atl. 23 (1892).

nerships operating in several states, which could be avoided by localizing the transfer of such share at decedent partner's domicile. Whether the Court will give such effect to these considerations cannot be safely predicted. If it should be held that the state in which the partnership business and assets are located may tax, then multistate taxation will result unless *Blodgett v. Silberman* follows *Blackstone v. Miller.* Furthermore it cannot be definitely determined whether this situation, or the case of credits with a business situs outside the domiciliary state, constitute instances in which a single economic interest has such legal relationships to both the non-domiciliary and domiciliary states as to justify taxation by both, but both are probably within that principle. It is patent, in any event, that here is another uncertainty attributable to these recent decisions.

The prevailing opinion in *Farmers Loan & Trust Co. v. Minnesota* refers to the large proportion of our national wealth represented by intangible personalty, and the desirability of protecting it against discriminatory and oppressive taxation. Corporate shares comprise a considerable part of such intangible wealth that would seem to merit protection no less than capital investments represented by debtors' obligations in their various forms. The ultimate economic interest evidenced by a corporate share derives its value from the business and assets of the corporation, and, therefore, bears a closer economic relation to the states in which the assets are situated and the business conducted than it bears to other states whose claims rest solely on the factors of corporate domicile or the share owner's domicile. It may be inferred from the decision that due process prevents a state from imposing an inheritance tax on the succession to corporate shares, even at a value proportionate to the assets within the taxing state, merely on the basis of the presence of corporate assets or business within it, that the economic factor is not the principal legal determinant.[28] The legal theory that the property interest represented by the share is a distinct legal interest, including no direct legal relation of the shareholder to the corporate assets and having a situs unrelated to that of such assets, prevailed over economic facts. There have been no decisions by the Federal Supreme Court directly passing on the power of the state in which the stock certificates are kept for safekeeping to impose an inheritance tax on their transfer

[28] Tyler v. Dane County, 289 Fed. 843 (D. C. Wis. 1923), appeal dismissed, 266 U. S. 637, 45 Sup. Ct. 10, 69 L. ed. 481 (1924); Shepherd v. State, 184 Wis. 88, 197 N. W. 344 (1924); Rhode Island Hospital & Trust Co. v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256, 70 L. ed. 475, 48 A. L. R. 1374 (1926).

on that sole basis, but the decision in the *Baldwin Case* clearly implies that such tax cannot be imposed merely because such certificates happen to be found within a state at the time of their non-resident owner's death. An attempt by a state to impose such tax on the sole basis that the stock was transferred on the corporate books at a transfer office maintained in the state by a foreign corporation would almost certainly be held to violate due process, but the Court has not yet passed on that point. There are, however, decisions of the Court sustaining the power to impose inheritance taxes on the transfer of corporate shares by both the state of the corporate and of the decedent owner's domicile.[29] It is fairly certain that the multi-state inheritance taxation of this form of intangible wealth will be held violative of due process unless adequate reasons can be found for distinguishing capital investments evidenced by corporate shares from such investments evidenced by debtors' obligations. There is no economic basis for any such distinction. The legal theory on which the state of the corporate domicile has been permitted to tax the transfer is that the shares have a situs within it since they represent a distributive share in the capital stock which itself has its situs within that state, and that that state has the ultimate control over the transfer of such shares. The fiction of *mobilia sequuntur personam* has supplied the legal basis for permitting the state of decedent's domicile to tax the transfer of corporate shares. These reasons are certainly no more substantial than those formerly relied on to sustain the power of several states to impose inheritance taxes on the transfer of credits. Unless, therefore, reasons of policy can be found for distinguishing the cases, the multi-state inheritance taxation of corporate shares will soon be a thing of the past. There is no doubt but that the case of such shares comes within the theory of Mr. Justice Stone that would permit multi-state taxation in this instance, but nothing as yet warrants a belief that his theory has gained acceptance among those whose views will decide the issue. If, however, multi-state inheritance taxation of corporate shares is to be prohibited, the question of which state shall be granted the power becomes important. The decision will lie between the state of the corporate and that of decedent's domicile. The decision in *Frick v. Pennsylvania,* limiting the latter state to taxing on a value arrived at

[29] Bullen v. Wisconsin, 240 U. S. 625, 36 Sup. Ct. 473, 60 L. ed. 830 (1916); Frick v. Pennsylvania, 268 U. S. 473, 45 Sup. Ct. 603, 69 L. ed. 1058, 42 A. L. R. 316 (1925).

by deducting from the value of the stock the inheritance tax paid with respect to its transfer to the state of the corporate domicile, clearly rests on the theory that the claims of the state of the corporate domicile are superior to those of the state of decedent's domicile. The legal theory underlying this preference is one developed for quite other problems than taxation, and the tax issue should not be settled by reasoning from it as a premise. It contains elements of fiction as does the theory employed to justify the state of decedent's domicile to tax at all. The issue of which of these states should be preferred should not be settled on such tenuous grounds. It cannot be settled by invoking the theory that correlates jurisdiction with protection since both states protect the legal interest represented by the share in some respects and under some circumstances. The state of decedent's domicile is that in which ordinarily the decedent's economic position will be most affected by his ownership of such shares while he was alive. That state also will usually have protected his person in a degree beyond that secured from the state of the corporate domicile. It would seem that these considerations, and the greater convenience of localizing the share at his domicile, should lead to a reversal of the preference for the state of the corporate domicile implicit in the decision in *Frick v. Pennsylvania.* It must be admitted that reliance upon the argument based on the protection of the person of the decedent while living introduces a factor whose logical consequences might conflict with those implicit in theories elsewhere employed to justify restrictions on the domiciliary state's power, but complete consistency of theory can scarcely be hoped for in dealing with a complex series of problems whose solution involves many and competing considerations. The claims of the decedent's domiciliary state are strengthened by the consideration that it will usually be that in which such assets are certain to be administered whereas administration in the state of the corporate domicile will be required only to satisfy its taxing statutes. The recent decisions have injected an element of uncertainty into the law of the inheritance taxation of corporate shares, and made changes in it very probable.

That a state cannot impose an inheritance tax on the transfer of notes of resident debtors actually administered through its courts even when the notes are secured by mortgages on lands situated within it is clear from the decision in the *Baldwin Case.* It follows that a state would be prohibited from imposing such tax on the transfer of such notes if the only basis on which it could rest the power was that they were secured by mortgages or liens on local assets. There have been cases in which the fact that credits owned by non-residents were secured by mortgages on local real estate constituted a principal reason for holding their transfer taxable.[30] The theory was largely that that fact gave the credit a situs within the taxable state because of control over the enforcement of the claim, rather than that the tax was on the succession to the mortgage interest in the land which would pass with the transfer of the credit, although that view seems at least to be suggested. These cases can no longer be regarded as law so far as they allowed the transfer of the credit to be taxed.[31] The prevailing opinion in *Baldwin v. Missouri,* however, explicitly stated that that case did "not involve the right of a state to tax either the interest which a mortgagee as such may have in lands lying therein, or the transfer of that interest." Does this reservation of that issue from the scope of the decision mean anything more than that that question is still open? Can it be construed as implying a doubt as to the power of a state to tax the succession to such interest even though it cannot tax the claim secured by the mortgage? To resolve that doubt in favor of the power to tax will greatly limit the benefits sought to be achieved by the recent decisions unless the power of the decedent's domicile is concurrently and correspondingly curtailed. That is quite improbable since the theory on which the state in which the mortgaged property is situated will be allowed to tax, if it is allowed to do so, will involve no conflict with the principle localizing the credit at the decedent's domicile. The result will be that the latter will be permitted to tax the transfer of the credit while the former will be empowered to tax the concurrent transfer of the creditor's security interest. The character of that security interest might be either legal or equitable,[32] but this should not affect the power to impose the tax of the state in which that interest may be said to have its situs. If the credit is secured by mortgage on property in more than one state, the argument would run in favor of all of them, at least so far as to permit

[30] Kinney v. Stevens, 207 Mass. 368, 93 N. E. 586 (1911); Auditor General v. Merriam's Estate, 147 Mich. 630, 111 N. W. 196 (1907).

[31] The Supreme Court of Iowa reversed a former holding to the contrary shortly after the decision in Farmer's Loan & Trust Co. v. Minnesota, even where the debtor was domiciled within it. See *In re* Smith's Estate, 228 N. W. 638 (Iowa 1930).

[32] For an instance of the latter see Kinney v. Stevens, 207 Mass. 368, 93 N. E. 586 (1911).

each to tax the transfer on the basis of an allocated value and, perhaps, on a value equal to the whole value of the credit up to the value of the security within the state. The bondholder whose bonds are secured by a deed of trust has an equitable interest in the security, and under this theory the succession to his interest could be taxed wherever the property covered by the trust deed had its situs. This might be partly avoided by localizing the equitable interest at the trustee's domicile. The friction and annoyance incident to such a system make those against which *Farmers Loan & Trust Co. v. Minnesota* was aimed seem insignificant. It is quite true that the system would not involve multi-state taxation of the same legal interest, but it is unlikely that this would deter the court from invoking due process to prevent it. It is, therefore, improbable that the statement of the plain fact that *Baldwin v. Missouri* did not involve a particular question will ever be held an adequate basis for concluding that a state will be permitted to tax the succession to the security interest when it cannot tax the transfer of the secured credit.

There are several other decisions involving situations, on which the Federal Supreme Court itself has not yet passed, whose status is doubtful since it decided the recent cases. The first of these involves the question of what states can impose inheritance taxes on the succession to a decedent's beneficial interest in property held in trust. The state of his domicile can constitutionally impose property taxes on that interest,[33] and that state has been allowed to impose an inheritance tax on its transfer.[34] On the other hand the state of principal administration of the trust,[35] and the state in which the trust realty had its situs,[36] have taxed the succession to a non-resident decedent's beneficial interest. None of these cases specifically discussed a constitutional question, but their arguments do purport to deal with the jurisdictional problem. There are also the situations in which an inheritance tax has been imposed on a resident vendor's interest in a land contract relating to realty in another state,[37] and on a non-resident vendor's interest under a land contract relating to realty within the taxing state.[38] Neither of these cases explicitly

[33] Hunt v. Perry, 165 Mass. 287, 43 N. E. 103 (1896).
[34] Dana v. Treas & Rec. General, 227 Mass. 562, 116 N. E. 941 (1917).
[35] Thorne v. State, 145 Minn. 412, 177 N. W. 638 (1920).
[36] Baker v. Comm'r of Corp. & Taxation, 253 Mass. 130, 148 N. E. 593 (1925).
[37] State *ex rel.* Hilton v. Probate Court, 145 Minn. 155, 176 N. W. 493 (1920).
[38] *In re* Roger's Estate, 149 Mich. 305, 112 N. W. 931 (1907).

considered the constitutional point. If the state of vendor's domicile can validly treat his interest as personalty, while that in which the lands are situated can still treat the land as legally his, the result is multi-state taxation of a kind no less burdensome than the taxation of the same legal interest by more than a single state. These problems have not yet been authoritatively settled, but the recent decisions suggest more than a possibility that the attempts of different states to impose inheritance taxes on various and inconsistent theories will be further limited as soon as the Federal Supreme Court has occasion to pass on them. It is further certain that the court will not countenance the practise of some states to invoke the fiction of equitable conversion to extend their powers to impose inheritance taxes on the succession to foreign realty of decedents dying domiciled within them.[39]

The formal factor on which a state's power to impose property or inheritance taxes depends is that the property have its situs within it. It must be apparent from what has already been said that the decision that an intangible has a situs within a certain state is not the affirmation of a fact but the formulation of a legal conclusion,[40] and that considerations of reasonable policy are important in reaching that conclusion. The preceding discussion has been wholly concerned with the effect of the recent decisions on the law as to a state's power to impose inheritance taxes, which alone were involved in those cases. The questions arise whether the law as to a state's power to impose property taxes on intangible personalty is likely to remain unaffected, and what, if any, changes are likely to occur. That some changes are likely can fairly be deduced from the fact that the evils aimed at by the recent decisions are at least as great from an annually recurring tax as from an inheritance tax. The attempt of the debtor's state to tax the bondholder's property interest was early frustrated by the Supreme Court[41] even when the bonds were secured by mortgage

[39] See Land Title & Trust Co. v. Tax Comm., 131 S. C. 192, 126 S. E. 189 (1924), which collects authorities both sustaining and refusing to apply this theory.

[40] This is equally true of a judgment that a tangible has a certain situs. It is only the fact that the physical location of a tangible is generally, but not always, the decisive factor in determining its situs that has tended to obscure the truth that the judgment as to the situs of tangibles is a legal construction of fact, not a mere factual judgment.

[41] State Tax on Foreign Held Bonds, 15 Wall. (U. S.) 300, 21 L. ed. 179 (1873). This case has been cited more frequently than its merits warrant, especially since the jurisdictional problem has become a matter of the meaning of the due process clause of the fourteenth amendment. It may still have

on realty within the taxing state.[42] The power of the creditor's state to tax them was early sustained against the contention, among others, that the tax violated the due process clause.[43] The tax was upheld on the theory that the situs of the credit was at its owner's domicile, and that this was not affected by the fact that it was secured by a mortgage on realty in another state. An attempt to deduce from the theory that a bond is something more than a mere evidence of the debt the conclusion that it, and the mortgage securing it, were tangibles or sufficiently of that nature so as to be within the principles governing the taxation of tangibles, has been rejected, even when the bond was that of a non-resident debtor secured by a mortgage on non-local realty and both had always been kept for safekeeping in a state other than that of the owner's domicile.[44] The theory that due process prevents a state from taxing credits on the sole basis of the presence within it of the instruments evidencing the credit, announced in *Buck v. Beach*,[45] is not likely to be abandoned, and bonds will certainly be held within it if a case should ever arise. Bonds were already protected against multi-state property taxes under earlier decisions, and the recent cases merely give additional support to that position. This conclusion applies equally to credits evidenced by notes or mere open accounts. Neither conclusion applies where the bonds, notes or accounts have acquired a business situs in a state other than that of their owner's domicile.

It has been frequently decided that a state other than that of the owner's domicile can tax credits, whether or not evidenced by notes, if those credits have acquired what is described as a business situs within it.[46] It is not within the purview of this discussion to consider what facts will warrant the legal inference that credits have a business situs within a given state.[47] It is of importance that it has been stated that the jurisdiction of the state of the owner's domicile to impose property taxes on such credits does not exclude the power

value if it be assumed that it embodies an interpretation of fundamental jurisdictional principles in the light of which due process is to be construed.

[42] North Cent. Ry. Co. v. Jackson, 7 Wall. (U. S.) 262, 19 L. ed. 88 (1866).

[43] Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558 (1879).

[44] Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927).

[45] 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106 (1907).

[46] Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900); New Orleans v. Stempel, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899); Met. Life Ins. Co. v. New Orleans, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. ed. 853 (1907); London & L. & G. Ins. Co. v. Bd. of Assessors, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. ed. 762 (1911).

[47] See Powell, *The Business Situs of Credits* (1922) 28 W. VA. L. Q. 89.

of the state of their business situs to impose like taxes thereon.[48] The question is whether the recent decisions imply a negative upon the continuation of the multi-state taxation of such credits. Their treatment for inheritance tax purposes is still an open question, and the same must be said as to their treatment for purposes of property taxes. The considerations heretofore adduced when discussing the probable decision as to their liability to inheritance taxes are relevant in discussing their position for property tax purposes. If the prohibition on multi-state taxation of a person's legal interest in a single economic interest is to be carried to its logical conclusions, the existing law as to imposing property taxes on credits having a business situs in a non-domiciliary state will have to be changed. There is no sound economic basis for distinguishing capital invested in a state represented by credits having a business situs within it from direct investments of capital in seats on exchanges of various kinds. It has been decided that a state does not deny its residents due process by imposing property taxes on seats on exchanges located without the state,[49] and that the state in which the exchange is located can tax non-residents on their seats on such exchange without violating due process.[50] These decisions thus expose the legal interest in a single economic interest to multi-state taxation. It is difficult to see how both these decisions can stand in the light of the recent cases unless either the theory of Mr. Justice Stone be applied, some other theory heretofore invoked to sustain these taxes be reaffirmed, a new theory be developed, or the position be adopted limiting the scope of the recent decisions to inheritance taxes. If the multi-state property taxation of exchange seats is to be prohibited, the theory urged by Mr. Justice Holmes in *Citizens National Bank v. Durr* that the location of the object of the right is a factor in the jurisdictional problem might well be employed to limit taxation to the state in which the exchange is located. The considerations applicable to the problem of exchange seats are equally applicable to the capital interest represented by a partner's share in the partnership business and assets. Existing decisions also permit property taxes to be imposed on corporate shares by both the state of the corporate domicile and

[48] London & L. & G. Ins. Co. v. Bd. of Assessors, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. ed. 762 (1911).

[49] Citizens Nat. Bk. v. Durr, 257 U. S. 99, 42 Sup. Ct. 15, 66 L. ed. 149 (1921).

[50] Rogers v. Hennepin County, 240 U. S. 184, 36 Sup. Ct. 265, 60 L. ed. 594 (1916).

that of their owner's domicile.[51] How far these decisions still stand must now be deemed an unsettled question. The same must be said of such taxation of property held in trust and of the beneficial interest therein. It has been decided that a state cannot impose a property tax on the trust res, even when this consists of intangibles, merely because the cestui is domiciled within it,[52] or because of that factor and the fact that it was established by a resident settlor.[53] It is quite probable from the importance played by the desire to avoid double taxation in the argument of the prevailing opinion in the case last cited that multi-state property taxation of intangibles held in trust will not be permitted. The same case, however, intimates that the principle against multi-state taxation, as conceived by the Court, will not prevent the taxation of the trust res by one state and the taxation of the cestui's equitable interest by another,[54] but that it will permit more than one state to tax such interest is quite improbable, but still undecided. Further questions that remain open are the taxation of a resident vendor's interest under a land contract pertaining to foreign realty and the taxation of the same vendor on his interest in such land by the state in which the land is situated. It is unlikely that the recent decisions will have any effect upon a state's power to impose property taxes on the security interest of a non-resident in local realty.

The conduct of a business employing tangibles frequently produces an intangible variously described as good-will, franchise value, or corporate excess. The state of the corporate domicile has been allowed to tax the whole of this intangible even where all the income producing tangibles and business were outside it, and this was held not to violate due process.[55] It has also been decided in a long line of cases that other states in which the business is conducted can with-

[51] Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297, 49 L. ed. 556 (1905); Hawley v. Malden, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. ed. 477 (1914); Bellows Falls Power Co. v. Comm., 222 Mass. 51, 109 N. E. 891 (1915).

[52] Brooke v. Norfolk, 277 U. S. 27, 48 Sup. Ct. 422, 72 L. ed. 767 (1928).

[53] Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 Sup. Ct. 59, 74 L. ed. 180 (1929).

[54] The taxation of the *cestui's* interest by the state of his domicile on that basis alone has been held not to be unconstitutional, Hunt v. Perry, 165 Mass. 287, 43 N. E. 103 (1896). See for similar holding where there were other possible bases on which to support the tax, City of St. Albans v. Avery, 95 Vt. 249, 114 Atl. 31 (1921); cert. denied, 257 U. S. 640, 42 Sup. Ct. 51, 66 L. ed. 411 (1921); Writ of Error dismissed, 257 U. S. 666, 42 Sup. Ct. 54, 66 L. ed 425 (1921).

[55] Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325, 40 Sup. Ct. 558, 64 L. ed. 931 (1920).

out violating due process tax a part of that intangible property by the employment of the "unit rule" theory.[56] The particular principles defining the constitutional limits on a non-domiciliary state's power to determine the amount of such intangible allocable to it lie outside the scope of the present discussion. The fact of present significance is that, as long as all these decisions stand, this intangible will be subject to taxation on its full value in the domiciliary state and to further taxation in other states on that portion of its value allocable to them. This will be true even if the rules adopted by all the states involved for determining its value produce the same value, and those employed by the non-domiciliary states for allocating values to them result in no duplication of values. There is no doubt but that the logical consequences of the theory that due process prohibits multi-state taxation of an owner's legal interest in a single economic interest involve the scrapping of the existing system for taxing this intangible. It was because of this very fact that the dissenting opinions in the early cases involving this system argued for localizing that intangible at the owner's domicile.[57] The law has, therefore, been developed in the face of contentions that it would produce double taxation, but this fact loses practically all its importance because judicial hostility towards the double taxation of intangibles developed thereafter. If this movement is extended to this type of intangible, there will arise the very troublesome problem of which state shall be permitted to tax. The taxpayer's convenience would be best served by localizing it at the corporate domicile. That would, however, involve ignoring the economic claims of the states in which are located the property and business to which this intangible owes its existence. The result reached in *Cream of Wheat Co. v. Grand Forks* has but little to recommend it from the point of view of the economic considerations just referred to. To exclude the power of other states having a superior economic claim to tax this wealth merely to prefer that of a state having no other claim than that the corporation was chartered by it seems economically unsound, even

[56] Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. ed. 613 (1891); Adams Exp. Co. v. Ohio, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965 (1897); Adams Exp. Co. v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. ed. 960 (1877); Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761 (1904); Southern Ry. Co. v. Kentucky, 274 U. S. 76, 47 Sup. Ct. 542, 71 L. ed. 934 (1927). See Isaacs, *The Unit Rule* (1926) 35 YALE L. J. 838.

[57] See Adams Exp. Co. v. Ohio, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. ed. 683 (1897).

after allowing for the consideration that the state may have been selected as that in which to incorporate in order to secure valuable economic advantages. If it should be decided to prohibit this type of multi-state taxation, it may prove necessary to prevent evasions by correspondingly limiting the power of the states in selecting measures for excise taxes on the privilege of existing as a corporation or engaging within them in business in corporate form. It is practically certain that the Court will not derive from the premise that due process prohibits multi-state taxation the conclusion that the methods for determining the value and the allocation formulas of the various states that may be permitted to tax a part of this intangible wealth must be so related that no duplication of values occurs. The only practicable method for insuring that result would be to have the identical methods and formulas in all the states, and to use only factors objectively determinable so as to avoid possible duplication of values resulting in the course of administering the laws. This would require judicial action that is not likely to be deduced from the due process clause. It is, therefore, fairly arguable that the existing law on this problem shares to some extent in the uncertainty which the recent decisions have introduced into the problem of the limits imposed on a state's taxing power by the due process clause.

The preceding discussion has aimed primarily to indicate the extent to which the recent decisions have disturbed the system of rules and principles governing a state's jurisdiction to tax that had been constructed over a long period of years. That law had been developed in part by applying to tax problems technical theories and premises that had been evolved for other purposes, and in part by invoking considerations of policy definitely related to the tax problem. A clear instance of the former type is that which supports the power of the state of the corporate domicile to tax the shares owned by non-residents because the share represents an interest in the capital stock which has its situs in that state. Factors of policy are present in the theories that correlate the power to tax with the power to protect the thing taxed or the person of its owner, and in the arguments supporting the power of a given state to tax intangibles because they might otherwise wholly escape taxation. Mr. Justice Stone supports his opposition to the decision in *Baldwin v. Missouri* by the argument that it will tend to facilitate tax evasion. The principal factor in the recent decisions was the desire to prevent what were conceived to be the injustices and other bad consequences of the multi-state taxation of intangibles, an argument whose validity cannot be even discussed without bringing in questions of what constitute sound tax policies. The dissenting views of Mr. Justice Holmes in the recent cases acquire a large measure of their force from their emphasis on the necessity of permitting states considerable leeway in raising their revenues. The recent cases do not differ from many that preceded them in invoking considerations of policy as factors in their decision. They differ only in the relative importance attached to factors of policy as compared with other factors, and in giving what appears to be decisive importance in dealing with the taxation of intangibles to a policy whose relevance in that connection had theretofore been denied. The economic effects of a state's tax policy upon the maintenance of a free capital market within the whole of the United States has thus become a crucial element in determining the validity of its fiscal program under the due process clause. There is no reason why this should not be considered if other factors of policy are to be taken into account, and experience has shown that it is practically impossible to exclude them in applying the test of reasonableness that determines the validity of state action when due process is invoked to defeat it. It would seem to be much more pertinent to that issue than some of the technical legal arguments employed in dealing with this jurisdictional problem. It would, however, be a mistake to treat it as always the decisive factor. The solution must take account of the necessity for giving states leeway in framing their tax policies not merely in order that they may secure adequate revenues but also in order that their powers to distribute the burden fairly be not too severely limited by subtracting from their power elements entering into the wealth of their residents. Even here it seems desirable to substitute for technical legal theories factors of economic significance. It may prove practically undesirable to localize the taxation of wealth or its transfer in those states in which the economic factors are present that give that wealth its value, and it may also be practically impossible to determine where it shall be localized on that theory. There is, however, no reason for ignoring this factor in determining the reasonableness of a state's taxing policy and thereby its validity. The recent decisions have the merit of frankly injecting economic considerations into the solution of these constitutional problems. They have opened the way to a reëxamination of our former solutions to some of them on the basis of more fundamental considerations than some that have in the past been employed in reaching those solutions.

A period of uncertainty as to how much of the former law on these jurisdictional problems remains unimpaired may ultimately prove a price worth paying for this opportunity to reëxamine, and perhaps redefine, the premises for our thinking about these problems.[58]

[58] For discussions of the general problem and related problems, see Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587; Carpenter, *Jurisdiction over Debts for the Purpose of Administration, Garnishment and Taxation* (1918) 31 HARV. L. REV. 905; Maxey, *Situs of Personal Property for Purposes of Taxation* (1919) 3 MINN. L. REV 217; Nossaman, *The Fourteenth Amendment in its Relation to State Taxation* (1930) 18 CALIF. L. REV. 345; Chambers, *State Inheritance Tax on Foreign-held Bonds or Notes Secured by Mortgage on Land in State* (1927) 12 CORN. L. Q. 172; Mason, *Jurisdiction for the Purpose of Imposing Inheritance Taxes* (1931) 29 MICH. L. REV. 324; C. L. B. Lowndes, *Tendencies in the Taxation of Intangibles* (1930) 17 VA. L. REV. 146; Peppin, *The Power of the State to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L. REV. 638.